

Before the  
UNITED STATES COPYRIGHT ROYALTY JUDGES  
LIBRARY OF CONGRESS  
Washington, D.C.

In the Matter of:

Determination of Royalty Rates and  
Terms for Making and Distributing  
Phonorecords  
(*Phonorecords IV*)

Docket No. 21-CRB-0001-PR  
(2023-2027)

SERVICES' **UPDATED** MOTION TO ACCESS AND TO MAKE USE OF THE  
RESTRICTED *WEBCASTING V* INITIAL DETERMINATION AND FUTURE  
SUBSTANTIVE RULINGS

Under 17 U.S.C. § 801(c), Amazon.com Services LLC, Google LLC, Pandora Media, LLC, and Spotify USA Inc. (collectively, the “Services”) request that the Judges allow all eligible participants in this proceeding full access to and use of the restricted version of the Judges’ Initial Determination in *Webcasting V* and any future substantive rulings in that proceeding, including but not limited to any decision in response to motions for rehearing or clarification, the Final Determination, and any decision by the Register (together, the “*Webcasting V* Materials”). The Services seek these materials for use on an outside-counsel-only basis, as provided in Section IV.B of the proposed *Phonorecords IV* Protective Order.<sup>1</sup> To

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<sup>1</sup> Counsel for the Services have conferred with counsel for the other eligible participants in this proceeding—the National Music Publishers’ Association and Nashville Songwriters Association International (together, “Copyright Owners”)—and counsel for participants in *Webcasting V*. We are authorized to state that Apple Inc. does not oppose this motion. The Copyright Owners do not oppose the relief sought but object to certain statements made in the motion. As for the participants in *Webcasting V*, Pandora Media, LLC, Google LLC, Sirius XM Radio, Educational Media Foundation, and the National Religious Broadcasters Noncommercial Music License Committee (“NRBNMLC”) do not oppose this motion; National Association of Broadcasters takes no position on it; and SoundExchange opposes the motion. Before filing this motion, the Services conferred extensively with counsel for SoundExchange – which also represents all of the record-label participants in *Webcasting V* – and noted its opposition in the initial filing. The Services therefore did not separately note the position of those same record labels, which comprise the Joint Record Company Participants here. That said, the Joint Record Company

that end, the restricted *Webcasting V* Materials would be treated as “Restricted” under both the *Phonorecords IV* Protective Order and the *Webcasting V* Protective Order<sup>2</sup> and may be used only by outside counsel and experts in this proceeding.

The Judges have previously granted motions to permit participants in a later proceeding to access and use restricted material—including determinations—from prior proceedings.<sup>3</sup> Most recently, in *Webcasting V*, the Judges granted SoundExchange and NRBNMLC access to the restricted *Phonorecords III* Final Determination and restricted *Phonorecords III* expert testimony for use in their respective written direct cases.<sup>4</sup>

Similarly, here, all eligible *Phonorecords IV* participants should be permitted to access and reference the restricted *Webcasting V* Materials. Although this proceeding concerns mechanical royalty rates for interactive streaming services, it follows the same willing-buyer-willing-seller legal standard applied in *Webcasting V*. In addition, the two proceedings may involve overlapping issues, including the role of the oligopoly power exercised by the record label companies in the sound-recording market.<sup>5</sup> The *Webcasting V* Materials may also address

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Participants have since informed the Services that, as “eligible participants” in this proceeding as well as participants in *Webcasting V*, they too oppose the motion and have asked the Services to so state in this amended filing.

<sup>2</sup> In the event of a conflict between the protective orders, the more restrictive provision will govern.

<sup>3</sup> See, e.g., Order Granting in Part Motion For Access to the Restricted *Phonorecords III* Determination and Certain Restricted *Phonorecords III* Testimony at 1, *Web V*, Docket No. 19-CRB-0005-WR (2021-2025) (Sept. 13, 2019) (“*Webcasting V* Order”) (granting access to restricted *Phonorecords III* determination and expert testimony); Order on SoundExchange Motion for Access to Restricted *Web IV* Evidence at 3, *SDARS III*, Docket No. 16-CRB-00001 SR/PSSR (2018-2022) (Jan. 25, 2017) (granting access to *Webcasting IV* restricted materials); Motion to Set Specific Discovery Deadlines and Compel the Copyright Owner Participants’ Adherence to their Discovery Obligations at 4, *SDARS III*, Docket No. 16-CRB-00001 SR/PSSR (2018-2022) (Aug. 23, 2016) (same); Order Granting in Part and Denying in Part Services’ Omnibus Motion to Compel SoundExchange to Produce Documents at 5, *Web IV*, Docket No. 14-CRB-0001-WR (2016-2020) (Jan. 15, 2015) (granting access to prior unredacted testimony in *Webcasting II* and *Webcasting III*).

<sup>4</sup> *Webcasting V* Order at 1.

<sup>5</sup> Compare *Johnson v. Copyright Royalty Bd.*, 969 F.3d 363, 372 (D.C. Cir. 2020) (“the sound recordings market is a complementary oligopoly”) with *SoundExchange, Inc. v. Copyright Royalty Bd.*, 904 F.3d 41, 53-57 (D.C. Cir. 2018) (upholding Board’s finding in *Webcasting IV* “that the interactive services market giving rise to

issues concerning the interactive services, evidence of which is likely to be offered by participants in this proceeding.<sup>6</sup> Thus, because the restricted *Webcasting V* Materials could be relevant to the issues in *Phonorecords IV*, this proceeding will be “enhanced, to the benefit of the Judges, if the parties have access” to the restricted *Webcasting V* Materials so that they “can make informed decisions as to the presentation of their direct cases.”<sup>7</sup>

Denying the *Phonorecords IV* participants such access could prejudice the participants in this proceeding and result in needless inefficiencies. The public, redacted versions of the *Webcasting V* Materials may not allow the Services to fully understand and evaluate the implications of that determination for this proceeding. For example, the redacted version may not reveal how the specific economic analyses presented may have influenced the Judges’ determination, or how—if at all—those analyses might impact this proceeding. Because the Judges often “are informed” in one set of royalty-setting proceedings by their decisions in proceedings setting other royalties—and are required to act on the basis of applicable prior determinations (17 U.S.C. § 803(a)(1))—the *Phonorecords IV* participants and their experts should have full access to the restricted *Webcasting V* Materials.<sup>8</sup>

Granting the *Phonorecords IV* participants access to future substantive rulings in *Webcasting V* now will likewise eliminate inefficiencies and avoid unnecessary delay. The same reasons that support the participants obtaining access to the *Webcasting V* Initial Determination support the participants receiving access to subsequent substantive decisions. Indeed, because

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SoundExchange’s benchmark was inadequately competitive due to the possession of oligopoly power by certain copyright holders”).

<sup>6</sup> See, e.g., *SoundExchange*, 904 F.3d at 53 (noting that SoundExchange proposed a benchmark based on the interactive services market in *Webcasting IV*).

<sup>7</sup> *Webcasting V* Order at 3.

<sup>8</sup> E.g., Order Granting in Part and Denying in Part Motions for Rehearing (Amended) at 18, *Phonorecords III*, Docket No. 16-CRB-0003-PR (2018-2022) (Jan. 4, 2019).

the Final Determination and any decisions by the Register have the force of law, granting access to those subsequent materials is even more imperative. Requiring the parties here to file new motions each time a new substantive decision is issued in *Webcasting V* would result in needless inefficiencies and duplicative motion practice.

For these reasons, the Services request that the Judges promptly grant this motion and rule that eligible participants in this proceeding may have access to and use the restricted *Webcasting V* Materials, subject to Section IV.B of the proposed Protective Order in *Phonorecords IV*. Specifically, the Judges should direct the overlapping parties in *Phonorecords IV* and *Webcasting V*—Google LLC and Pandora Media, LLC—to provide copies of the restricted versions of the *Webcasting V* Materials to the eligible parties in this proceeding.

The deadline for the *Phonorecords IV* participants to submit their direct cases is rapidly approaching. The participants—and, more importantly, their experts—require sufficient time to analyze the *Webcasting V* determination and incorporate it as appropriate into their direct statements. For that reason, the Judges should set a schedule for responses (if any) to this motion so that it can be resolved in a timely fashion. Consistent with the Judges’ rulings in connection with SoundExchange and NRBNMLC’s motion in *Webcasting V* seeking access to restricted *Phonorecords III* materials, the Services request that the Judges direct any participants who choose to respond to this motion to file responses by July 30, 2021 at the latest.

Respectfully submitted,

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# Proof of Delivery

I hereby certify that on Wednesday, July 21, 2021, I provided a true and correct copy of the Services' Updated Motion to Access and to Make Use of the Restricted Webcasting V Initial Determination and Future Substantive Rulings to the following:

Copyright Owners, represented by Benjamin K Semel, served via ESERVICE at Bsemel@pryorcashman.com

Johnson, George, represented by George D Johnson, served via ESERVICE at george@georgejohnson.com

Zisk, Brian, represented by Brian Zisk, served via ESERVICE at brianzisk@gmail.com

Joint Record Company Participants, represented by Susan Chertkof, served via ESERVICE at susan.chertkof@riaa.com

Apple Inc., represented by Mary C Mazzello, served via ESERVICE at mary.mazzello@kirkland.com

Powell, David, represented by David Powell, served via ESERVICE at davidpowell008@yahoo.com

Signed: /s/ Joshua D Branson